grown up however. One of these, the holding of mortgaged land which has come to a devisee primarily liable for the mortgage debt, is discussed in a recent article in the Virginia Law Register. *The Equitable Doctrine of Marshalling the Assets of a Decedent's Estate for the Payment of Debts*, by C. B. Garnett, 11 Va. L. Reg. 175. That the mortgagee in such cases may, in the absence of statutes, resort to the personalty for the payment of the debt is not questioned.[2] When he does this, however, to the detriment of pecuniary legatees, equity gives those legatees a claim on the estate to the extent to which funds, otherwise theirs, have been applied in discharging the debt. This has long been settled in England.[3] At present, in that country, the matter is to a large extent covered by statutes.[4] The English doctrine is generally followed in the United States,[5] though not universally.

It would seem that the prevailing view is not wholly unassailable. It is not altogether easy to see the grounds on which the courts have taken the mortgage debt out of the class of other debts. In the case of a vendor's lien on land devised it has been held that pecuniary legacies may be encroached upon for the exoneration of the land and that the legatees do not thereby gain the right to be repaid out of the land.[6] For the purpose of deciding which of two objects of a testator's bounty is to be preferred to the other, the distinction between the devisee of land for which the testator has not paid and the devisee of land on the security of which he has obtained a loan seems somewhat fine. Moreover, the early decisions apparently proceeded upon the assumption that as against the pecuniary legatee the devisee of a mortgaged estate had the equity of redemption only.[7] It would seem to follow that he should have no more as against the residuary legatee. Yet the courts hold that as against the residuary legatee the devisee is to be preferred.[8] The doctrine under discussion, although followed, has been frequently criticised by English courts. In a comparatively recent case, while the court regarded the rule as too well settled by authority to be changed, it was pointed out that there seems to be no real reason for holding that the devisee of mortgaged land is less entitled to preference than the pecuniary legatee, both being at least equally objects of the testator's intended bounty.[9] In the United States there are a few decisions holding that unless the testator has expressed a contrary intention a devisee of mortgaged real estate is entitled to have the mortgage discharged out of the personal estate even though the latter is insufficient to pay general pecuniary legacies.[10] It would seem as a matter of logic that this view is to be preferred to that of Mr. Garnett, who supports the doctrine followed by the weight of authority.

MODERN VIEWS OF CHAMPERTY AND MAINTENANCE. — The first definite recognition of champerty and maintenance in English law is found in a series of statutes of Edward I., making them criminal offenses.[1] The object

2 Hewes *v.* Dehon, 3 Gray (Mass.) 205.
3 Lutkins *v.* Leigh, Cas. t. Talb. 53.
4 17 & 18 Vict. c. 113.
5 Gould *v.* Winthrop, 5 R. I. 319.
6 Todd *v.* McFall, 96 Va. 754.
7 Wythe *v.* Henniker, 2 Myl. & K. 635, 644.
8 Thomas *v.* Thomas, 17 N. J. Eq. 359.
9 *In re* Smith, [1899] 1 Ch. D. 365.
10 Brown *v.* Baron, 162 Mass. 56.

1 See Schomp *v.* Schenck, 40 N. J. Law 195, 205.

was to prevent intimidation of the courts by the great lords, who by enlisting in suits in which they had no proper interest, overawed courts and juries, and perverted "the remedial process of the law into an engine of oppression." [2] Although under modern conditions this danger of intimidation has passed away, still "the public advantage, even with powerful and incorruptible courts, of 'letting sleeping dogs lie,'" [3] and the public necessity of discouraging "the traffic of merchandising in quarrels, of huckstering in litigious discord," [4] demand as strongly as ever the condemnation of these practices. The immense volume of our present-day personal accident litigation, however, might serve to suggest that this consideration has not always been borne in mind by the courts.

Champerty and maintenance have been discountenanced in three ways: (1) as crimes, (2) as torts, giving a right of action, aside from that for malicious prosecution, based on the right to freedom from molestation by suit, and (3) as illegal acts sufficient to render contracts involving them unenforceable. As criminal offenses they are obsolete,[5] nor is the action for damages common. The practical modern interest, therefore, centers in their possible effect upon the legality of contracts. A contract by an attorney to prosecute an action at his own expense, in behalf of his client, for a share of the proceeds of the suit, is the typical modern case. Such a contract, of course, falls exactly within the old definition of champerty; and the English courts, even though the attorney, in the utmost good faith, agree to take the righteous cause of a penniless client for a contingent fee of ten per cent of the recovery, refuse to enforce it.[6] By American courts, on the other hand, all such contracts are usually enforced, but on various theories.[7] Some courts, looking only at the old statutes, and seeing that the danger of intimidation of the courts does not exist in the United States, reject the whole doctrine.[8] Such a view was expressed in the recent case of *Smits* v. *Hogan*, 77 Pac. Rep. 390 (Wash.). Others recognize the illegality of champerty and maintenance at common law, but evade the logical result wherever possible by technical distinctions. For example, if the attorney agree to pay the costs of the suit, the contract is champertous; if he agree to prosecute the action at the client's expense, for a contingent fee, it is not champertous.[9] And in Massachusetts, if the attorney stipulate for one-fourth of the proceeds, the contract is champertous; if he is to receive an amount equal to one-fourth of the proceeds, it is good.[10]

Thus both English and American courts, while taking opposite views, seem to have this in common, that they ignore the vital question as to whether or not the particular contract under consideration is in reality against the public interest, as being vexatious and tending to promote strife, or as being extortionate and unconscionable. Unless it is against public policy for one or the other of these considerations, there would seem to be no reason for not enforcing it. This position has been taken in British India, and approved by the Privy Council.[11]

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[2] 2 Cooley, Bl. Com., 3d ed., bk. IV, 135.
[3] 6 L. Quar. Rev. 169.
[4] Knight Bruce, L. J., in Reynell *v.* Sprye, 1 De G. M. & G. 660, 686.
[5] 3 Steph., Hist. Eng. Crim. Law 234.
[6] Strange *v.* Brennan, 15 Sim. 346.
[7] Bayard *v.* McLane, 3 Harr. (Del.) 139, 216.
[8] Mathewson *v.* Fitch, 22 Cal. 86.
[9] West Chicago, etc., Commissioners *v.* Coleman, 108 Ill. 591, 601.
[10] Blaisdell *v.* Ahern, 144 Mass. 393, 395.
[11] Ram Coomar Coondoo *v.* Chunder Canto Mookerjee, L. R. 2 A. C. 186, 210.